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November 2, 2020

SUBMITTED VIA E-MAIL (404Assumption-FL@epa.gov)

Docket ID No. EPA–HQ–OW–2018–0640

The Honorable David P. Ross
Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington DC 20460

Re: Florida's Request to Assume Administration of a Clean Water Act Section 404 Program (published at 85 Fed. Reg. 57,853)

Dear Assistant Administrator Ross:

On behalf of the Florida Department of Environmental Protection (FDEP), I am writing in support of Florida's application to assume a Clean Water Act (CWA) Section 404 program. For the first time in decades, a state has undertaken the significant task of submitting a complete application to obtain approval of a Section 404 program. This was an enormous effort by FDEP and other stakeholders. We greatly appreciate EPA's timely and thorough review of our program application materials. Assumption of the 404 program, if approved by EPA, would be a major achievement both for EPA and the State of Florida.

FDEP would also like to thank EPA for extensive public engagement on FDEP's application. EPA has provided an opportunity for public written comments and also held two public hearings. EPA's public engagement followed our extensive state rulemaking process under state law – a process that also allowed valuable opportunities for public engagement and input.

The purpose of this letter is to address a few issues raised by commenters, including: (1) the completeness of Florida's application; (2) protection of listed species; (3) historic preservation and consultation with Florida's Tribes; (4) state resources to implement a 404 program in Florida; and (5) state enforcement. We trust that this information will be helpful to EPA as it considers the comments submitted by stakeholders.

Complete Application

Contrary to some of the public comments, FDEP's 404 assumption application is "complete," as EPA has correctly concluded, based on the requirements of the CWA and its implementing regulations found at 40 C.F.R. part 233. Section 404(g) of the CWA requires that a state submit "a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. § 1344(g). A state application must also include "a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel) … that the laws of such State … provide adequate authority to carry out the described program." *Id.* Under the applicable regulations, a state 404 assumption application must provide the items listed at 40 C.F.R. 233.10 (e.g., letter from the Governor, Attorney General's statement, agencies agreements, etc.). Additional requirements for a state program are set forth in the rest of Part 233, including Subpart C (permit requirements), Subpart D (program operation), and Subpart E (compliance evaluation and enforcement). Florida's application contained each of these required items along with sufficient detail and explanation to allow for EPA to review and consider the assumption request in accordance with the requirements of Section 404(g) and (h).

In the public comment process, some commenters argued that Florida's program lacks an adequate description of the waters covered by the state 404 program. That concern is incorrect. Our application clearly explains the waters for which the State of Florida would assume permitting responsibility and those which would remain under the regulatory purview of the U.S. Army Corps of Engineers. This is also described in the memorandum of understanding entered between Florida and the Corps of Engineers. In particular, we would direct your attention to page 2, section II, A-C of the memorandum of understanding. Furthermore, additional information can be found in the 404 Applicant Handbook Sections 2.0(b)41 and 4.1, and in the Retained Waters List in Appendix A of the 404 Handbook.

One commenter raised a concern over the 300-foot guideline the Corps and FDEP agreed to use to delineate the boundary of adjacent (and therefore retained) wetlands within the Florida-Corps Memorandum of Agreement (MOA). The commenter asserted that 300 feet was an arbitrary distance. Contrary to this assertion, this approach is based on a reasonable delineation as agreed upon by FDEP and the Corps. This approach was also reflected in the Final Report of the Assumable Waters Subcommittee (Final Report dated May 10, 2017), which is available for review on EPA's website at https://www.epa.gov/cwa404g/nacept-assumable-waters-subcommittee-final-report-may-10-2017.

In that report, the Assumable Waters Subcommittee recommended an approach labeled "Wetlands Alternative C3," where the Corps retains all wetlands landward to a default 300-foot administrative boundary that is adjustable to accommodate the unique regulatory, typographical, and hydrological needs of the state. In recommending this approach, the Subcommittee agreed that a distance of 300 feet is "fully adequate to protect federal navigation interests" and allows the state to protect wetlands and water quality as required by the CWA. *See* Final Report at p. 27 and 33. The Subcommittee favored Alternative C3 over the two other implementation strategies (Alternatives C1 and C2) because it retained the strengths of the previous two strategies, while

also allowing the local resource needs and existing programs from states and tribes to effectively incorporate Section 404 requirements into their existing framework. *Id.* at 28. To further determine the efficacy of Wetlands Alternative C3, the Subcommittee measured the strategy against eight criteria. These ranged from whether C3 was, as a whole, consistent with Section 404(g) and the CWA, to whether it provides clarity and efficiency in determining retained and assumable wetlands even outside 404 jurisdiction. The Subcommittee found it met all eight independent criteria and provided the level of effectiveness and regulatory certainty the Subcommittee determined was necessary for 404 permitting. *Id.* at 33. On July 30, 2018, the Assistant Secretary of the Army (Civil Works), R.D. James, accepted the Subcommittee's recommendation via a memorandum available on the Corps' website at https://api.army.mil/e2/c/downloads/525981.pdf.

Some commenters suggested that Florida's application is not "complete" or otherwise lacks adequate information about ESA protections because the anticipated biological opinion and incidental take statement, which would accompany EPA's final decision concerning Florida's application, is not yet available for review. This concern misunderstands the requirements of Section 7 consultation and how it relates to EPA's determination on an assumption application. Florida's 404 application, and EPA's public notice documents, describe species protection at length along with the programmatic consultation process. We would refer commenters to FDEP's 404 Applicant's Handbook Sections 1.3.3, and 5.2.3, and to Rules 62-331.053(a)4 and 62-331.248(3)(k). If commenters would like a detailed overview of the programmatic consultation process, it can be found in Appendix A(1) of the Program Description, pages 17-24. Notably, public comment is not required for a biological opinion and/or incidental take statement that accompanies a final action by EPA in these circumstances.[1]

Protection of Fish & Wildlife

Not only does Florida's application include adequate information, but Florida's overall approach is fully protective of the environment, including our state's wetlands and fish and wildlife species. FDEP has entered agreements with the Corps of Engineers and EPA, as well as a pending agreement with the U.S. Fish and Wildlife Service and the Florida Fish and Wildlife Conservation Commission to ensure a robust program that provides full protection for our state's wetlands. Approval of Florida's application would demonstrate a workable pathway for states interested in administering their own Section 404 programs. This is especially true for protection of threatened and endangered species and their habitats.

Florida's application provides for ESA consultation at the front end of the process, as well as allows for site-specific technical assistance under the terms and conditions of an anticipated programmatic biological opinion and incidental take statement. Some states may wish to pursue this same ESA programmatic consultation approach in appropriate circumstances, but all states would still reserve the flexibility to follow other lawful approaches that match state-

[1] *See, e.g., Cooling Water Intake Structure Coal. v. EPA*, 898 F.3d 173 (2d Cir. 2018), amended, 905 F.3d 49, 78 (2d Cir. 2018) ("[T]here is no independent right to public comment with regard to consultations conducted under §7(a)(2) of the ESA…So no procedural infirmity arises in failing to provide notice of or an opportunity to comment on the biological opinion or other determinations by the Services.").

specific needs and contexts, which is the essence of cooperative federalism. Indeed, federal law encourages the flexible use of Section 7 consultation to achieve the objectives of the Endangered Species Act. As the Eleventh Circuit has explained:

> Section 7(a)(2) of the ESA does not require that consultation under the act take place in any particular manner. Section 7(a)(2) simply directs the federal agency to "insure" in consultation with the [Services] that its actions are not likely to jeopardize the existence of listed species or their critical habitat. See 16 U.S.C. § 1536(a)(2). It is for the agencies to determine how best to structure consultation to fulfill Section 7(a)(2)'s mandate.

Defenders of Wildlife v. U.S. Dept. of Navy, 733 F.3d 1106, 1121-22 (11th Cir. 2013).

Florida's approach does not "bypass" species protection, as some commenters suggest. The opposite is true. Florida's approach, which would include the results of programmatic consultation under the ESA, ensures a careful, comprehensive process of engagement with both federal and state fish and wildlife agencies to ensure that 404 permitted activities do not jeopardize listed species or adversely modify critical habitat. In many ways, Florida's program – operating consistent with the results of programmatic consultation between EPA and the Services – will go above and beyond the requirements of federal law and ensure more robust protections for threatened or endangered species.

As mentioned above, Florida's proposed approach does not mean that an ESA section 7 consultation will be required for all state approvals or that all states must follow the same path as Florida's when developing their 404 program. For states like Florida that develop a fully assumed 404 program, including assumption of the ability to issue permits for projects that may affect listed species, Section 7 consultation applies. Conversely, for states that wish to pursue one of the other options suggested by commenters – i.e., fashion a 404 program that completely avoids ESA impacts, federalizes permits, or requires Section 10 permits - then Section 7 consultation may not be necessary. Indeed, when New Jersey applied for 404 assumption, EPA engaged in informal Section 7 consultation and concluded that the assumption by New Jersey of the 404 program would not adversely affect listed species or critical habitat in that context.

Some commenters have incorrectly suggested that programmatic consultation will place the state's 404 program under an "interminable" consultation situation where programmatic consultation is "reinitiated every time there's a regulatory change" such as a listing of a new species or designation of new critical habitat. This concern is misplaced. Nothing in the ESA would require re-initiation of formal consultation in this manner. Programmatic consultation under the ESA is flexible enough to provide for the addition of new species to the list of protected species as well as the additional designation of critical habitat. Such additions would then become part of the species review conducted under the terms and conditions of a programmatic biological opinion and incidental take statement.

In implementing the State 404 program, FDEP will send copies of all permit applications and its preliminary site-specific determination of potential effects to listed species to the USFWS for review and comment. This coordination is to ensure that any permit issued by FDEP is not

likely to jeopardize the continued existence of any listed or proposed species, or adversely modify or destroy designated critical habitat (pursuant to 40 CFR § 233.20(a)). Upon coordination, FDEP will consider any information that USFWS provides as technical assistance and will include all species protection measures that the USFWS may recommend as permit conditions or deny the request for a permit, whether the permit conditions are designed to avoid jeopardizing an ESA-listed species or adverse modification of designated critical habitat, or whether permit conditions are designed to avoid or minimize the amount of incidental take when the take or other effects would not be likely to jeopardize a species or adversely modify designated critical habitat. This exchange of information between USFWS and FDEP falls within the broad scope of "technical assistance" as described in the ESA's implementing regulations and the USFWS' Interagency Consultation Handbook.

Another commenter incorrectly argues that the programmatic approach will not provide state 404 permittees with take liability protection. This comment is incorrect and reflects a misunderstanding of how programmatic consultation has worked in other contexts and how it would work here. Under Florida's proposed programmatic consultation approach, liability protection under ESA Section 7 should extend to state 404 permittees who comply with the terms and conditions of the technical assistance process set forth in an applicable biological opinion with incidental take system, to the extent issued by the Services here. To avoid any uncertainty, we would encourage EPA and the Services to be very clear that, in this programmatic consultation context, take liability protection extends to state 404 permittees.[2]

At least one commenter misinterprets the 2015 ESA rulemaking as constraining programmatic consultations and then further suggests that the recent changes to the ESA Section 7 regulations (in the 2019 ESA reform regulations) have constrained programmatic consultations to an even narrower set of circumstances. This view is also incorrect. In the 2015 rulemaking and even more so in the 2019 rulemaking, the Services expanded and promoted the use of programmatic consultation as a viable path to streamline and improve the incidental take authorization process. For example, in the preamble to the ESA reform rules adopted by the Services in August 2019, the Services explained that programmatic consultation is a "***consultation technique that is being used with increasing frequency***" and that the reform rules "***promote the use of programmatic consultations as effective tools that can improve both process efficiency and conservation in consultations***." 84 Fed. Reg. at 44996. The Services further explained that Section 7 of the ESA "***provides significant flexibility***" and that "various forms of programmatic consultations have been successfully implemented for many years now" – a "general practice" that the 2019 rules intended to "codify." *Id.* ("programmatic consultation process offers great flexibility and can be strategically developed…").

[2] The Justice Department, on behalf of EPA, addressed this issue in a legal brief filed with the U.S. Court of Appeals for the Second Circuit in the 316(b) litigation, explaining: "Here, facilities have an incentive to comply with the technical assistance process and recommendations in order to obtain incidental take exemptions as part of their compliance with the NPDES permit process instead of going through a separate, additional process under ESA §10."

Preservation of Historic and Cultural Resources and Coordination with Florida's Tribes

Contrary to some commenters' views, Florida's 404 program will ensure the protection of historic and cultural resources in the State. FDEP has entered into an agreement with the State Historic Preservation Officer (SHPO), setting forth a consultation process called the "historic properties review," for assessing the potential effects that an activity in a pending 404 permit application may have on historic properties, and for avoiding, minimizing, or mitigating any adverse effects on highly-valued sites. This collaborative consultation process includes tribes, local governments, applicants, and the public, and is designed to complement established procedures for permit processing and public notice under the State 404 Program. In addition to the historic properties review, the State has promulgated regulations to ensure that all activities, including those authorized under State 404 general permits, require a "no effect" or "no adverse effect" determination by the SHPO prior to a permit authorization (Rules 62-330.302, F.A.C. and 62-331.201, F.A.C.). Furthermore, the regulations require immediate further consultation and coordination, and the ceasing of all work, in the event of unanticipated discoveries during construction (Rules 62-330.350 and 62-331.201, F.A.C.).

As reflected in the State's program submittal, FDEP is also committed to working closely with Florida's Tribes. The rule provisions in Chapter 62-331, cited above, resulted from extensive cooperative engagement with the Seminole Tribe of Florida and the Miccosukee Tribe of Florida, as did the aforementioned Operating Agreement with the State Historic Preservation Officer. The consultation envisioned under the historic properties review will provide the Tribes with greater participation in the review of applications under the State 404 permitting program, even more than they currently have under the current Corps regulatory program. For instance, the Tribes will have an opportunity to review and comment on applications during the FDEP's initial review and will have the ability to inform and add to the FDEP's Requests for Additional Information (RAIs) to permit applicants. This advanced coordination is in addition to the Tribe's ability to participate during the public notice and comment period, as well as the consultation that occurs as the result of an unanticipated discoveries during construction of an authorized project. Consistent with consultation set forth in 106(b) of the NHPA, the Operating Agreement further provides the Tribes with the opportunity to offer effects determinations, participate in the resolution of adverse effects, and request federal review in the event of disagreements with FDEP and/or the SHPO.

State Agency Resources

Some commenters have suggested that FDEP lacks the resources to handle assumption of the 404 program. This is incorrect. As fully supported in Florida's application, FDEP has the legal authority and agency resources, with the support of Florida's Governor and Legislature, to administer the Section 404 program. Upon assumption, the Section 404 program will be administered by the FDEP, through its dedicated staff of over 200 wetland scientists and professionals across the state. In addition, FDEP has a dedicated listed species coordinator and tribal and historical resources coordinator. FDEP's intimate knowledge of state aquatic resources, coupled with the efficiency and proven success of its own wetland permitting

program, will ensure that the Section 404 program will be implemented in a scientifically sound and protective manner.

FDEP's ability to successfully assume the 404 program is supported by Florida's handling of other federally-delegated programs, like the NPDES permit program, which Florida has been operating under EPA-delegation since October 2000. Florida has likewise successfully operated its existing state dredge and fill regulatory program known as the "Environmental Resource Permitting" or "ERP" program for over 20 years. FDEP estimates that the requirements of the ERP program overlap with federal requirements under Section 404 of the Clean Water Act by approximately 85%. Because of this significant overlap, Florida's staff is already poised to perform the types of review required under Section 404 of the Clean Water Act. Additional training is currently being provided to staff to further ensure program readiness.

Some contend that the State 404 program would not protect as many different types of wetlands as the federal regulations do. This is also incorrect. Unlike the Corps, the state's jurisdiction over wetlands is not limited to Waters of the United States (WOTUS). Under the current ERP Program, all wetlands and other surface waters that are jurisdictional under Chapter 62-340, F.A.C., Florida's delineation rule, are protected. This includes isolated wetlands that are not considered WOTUS. For efficiency sake, all wetlands and other surface waters that are jurisdictional under Chapter 62-340, F.A.C. will be treated as WOTUS under the State 404 Program unless the applicant provides documentation that a water is not a WOTUS. Even if FDEP agrees the water is not a WOTUS for 404 purposes, that wetland or other surface water will still be protected under the ERP program, which will remain in place after assumption.

A few commenters incorrectly asserted that FDEP's rules fails to regulate the list of "Special Aquatic Sites" in Subpart E of the 404(b)(1) Guidelines. These sites are clearly included in FDEP's regulations at "Special Aquatic Sites" in section 2.0 of the State 404 Program Handbook and Florida Administrative Code Rule 62-331.053.

Simply put, the assertions that Florida does not have adequate resources to operate the 404 program are unfounded and wrong. FDEP has demonstrated its ability to manage this program via the highly successful operation of its NPDES and ERP programs over the past 20 years. Moreover, the Florida Legislature, with support of the Florida Governor, passed a law charging FDEP with "the power and authority" to assume and implement 404 permitting program from the EPA.

Compliance & Enforcement

Contrary to the views of some commenters, Florida unquestionably has the enforcement authorities under state law necessary to implement its own state 404 program. As EPA recognized when it adopted the Part 233 requirements for State 404 Assumption in 1988, the Clean Water "does not specify that a State must have penalties equal to the Federal penalties or at any other particular level for an approvable program." 53 Fed. Reg. at 20771 (1988). Instead, Part 233 sets forth certain general requirements for purposes of ensuring comparable enforcement at the state level including. Specifically, Section 233.41 requires that states have the authority to stop unauthorized activity; enjoin threatened or continuing violations; assess civil

penalties for 404 violations of at least $5,000 per day of violation; assess criminal remedies for instances of willful violations or criminally negligent violations of at least $10,000 per day of violation as well as power to seek criminal fines for knowing false statements and other similar criminal conduct in an amount of at least $5,000 for each instance of violation. Likewise, Section 233.41 requires similar burdens of proof and mens rea under state law as federal law. As demonstrated in its complete application, Florida meets these requirements.

Florida not only meets these legal requirements under Section 233.41, but it is also well-prepared to address the compliance and enforcement responsibilities of the program from a functional standpoint. FDEP (formerly "FDER") has been enforcing Florida's dredge and fill regulations since the early 1970s; thus, it already has proven compliance and enforcement protocols in place that have been progressively enhanced for a half century. The bulk of the compliance and enforcement activities are conducted by FDEP's six district offices, with guidance from a centralized team of professionals in Tallahassee and legal support from FDEP's Office of General Counsel. Governor DeSantis bolstered FDEP's enforcement capabilities earlier this year by signing the Environmental Accountability bill into law which, among other enhancements, increased the civil penalty for 404 violations to 3 times the amount allowable under Section 233.41. FDEP's Office of General Counsel handles FDEP's civil enforcement litigation throughout the state. The State's Attorney General is also authorized to bring civil enforcement actions for injunctive relief on behalf of the State.

In addition, FDEP has an independent Environmental Crimes Unit comprised of 18 sworn law enforcement officers who are deployed throughout the state to investigate and enforce criminal violations of Florida's environmental laws. This unit was transferred to FDEP by the Florida Legislature in 2019 in response to Governor DeSantis's express direction to ensure strong enforcement of Florida's environmental laws for years to come. Fla. Exec. Order No. 19-12 (Jan. 10, 2019); Ch. 19-141, Laws of Fla. FDEP's law enforcement officers often work closely with Florida's many other law enforcement agencies, such as county Sheriff's departments and the state Fish and Wildlife Conservation Commission officers, when they have shared jurisdiction. All of the State's law enforcement officers with jurisdiction over environmental crimes, including FDEP's Environmental Crimes Unit, work closely with FDEP's dedicated staff of scientists, engineers, and environmental professionals that will administer Florida's 404 program. When arrests are made, one of Florida's 20 State Attorney's offices coordinate with FDEP's district offices and Office of General Counsel to prosecute the case in criminal court.

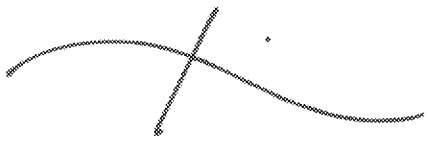
Again, Florida not only meets the legal compliance and enforcement requirements under Section 233.41 for 404 Assumption, but it also has a proven record of successfully enforcing environmental violations for decades. Under Governor DeSantis's leadership, the Florida Legislature has recently instituted measures that will enhance Florida's compliance and enforcement efforts – both criminally and civilly – for years to come.

Conclusion

As an important part of the Clean Water Act's cooperative federalism structure, 404 assumption will ensure greater protection of Florida's water resources, reduce duplication of effort and overall expenditures by state and federal authorities, and better align the Section 404 program with other programs for which Florida already has primary responsibility. Approval of Florida's application would also demonstrate a workable pathway for states interested in administering their own Section 404 programs, while also providing valuable flexibility for EPA and individual states to develop programs that match state-specific needs.

Thank you for your consideration of the foregoing responses to various comments submitted during EPA's public comment process.

Sincerely,



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